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No. 99-258

IN THE
Supreme Court of the United States

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN COUNCIL OF LIFE INSURANCE, THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE FINANCIAL EXECUTIVES INSTITUTE, MERCK & CO., INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, THE REAL ESTATE ROUNDTABLE, THE SECURITIES INDUSTRY ASSOCIATION, SUNOCO INC., THE TAX COUNCIL, THE TAX FOUNDATION, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici include voluntary business and professional associations representing a broad spectrum of industry and related interests which are affected, either directly or through their members or contributors, by the decision of the Third Circuit below.[1] *Amici* also include individual

[1] This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity, other than the

corporations that are adversely affected by the Third Circuit's decision and a nonprofit independent research and educational organization. Both the associations and the other *amici* are also concerned about the extraordinarily broad implications of that decision. While this case is a federal income tax case, there should be no misunderstanding about its scope: Under the rule adopted by the Third Circuit, deference must be accorded not only to an Internal Revenue Service("IRS") litigating position interpreting an ambiguous Treasury regulation, but to the litigating position of *any* federal agency interpreting *any* ambiguous federal regulation. The position of the *amici*, to the contrary, is that no deference is due to a mere litigating position of a federal agency, expressed through its counsel in an adversarial proceeding, interpreting an ambiguous regulation.

The Chamber of Commerce of the United States of America is the world's largest business federation representing an underlying membership of more than three million businesses and organizations of every size, in every sector and region of the country. The Financial Executives Institute is a professional association representing over 14,000 senior corporate financial officers in over 8,000 corporations throughout the United States and Canada. The National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing work-

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amici curiae, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the submission of this brief in letters of consent filed with the Clerk of the Court.

ers and produce over 80 percent of the nation's manufactured goods. Members of the Real Estate Roundtable include individuals who represent or are employed by a wide range of organizations with real estate interests: real estate investment trusts, private real estate companies, lending institutions, investment bankers, property management companies and developers. Member firms of the Securities Industry Association include more than 740 investment banks, broker-dealers, and mutual fund companies which collectively manage the accounts of more than 50 million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The Tax Council is a nonprofit organization with 110 members that are among the most prominent corporations, businesses and organizations in the nation, including 25 of the 50 largest corporations in the United States. The United States Council for International Business promotes the global interests of American business at home and abroad by representing U.S. business positions both in intergovernmental bodies and in direct dealings with foreign businesses and foreign governments.

The members of the foregoing association *amici*, or the organizations represented by members, are subject to federal tax regulations and to other federal regulations of virtually every description. The regulations run the gamut of federal authority and touch upon significant interests of these *amici* in their myriad activities. Many of the regulations are ambiguous. Accordingly, these *amici* have a profound interest in the decision of the Third Circuit below and in this Court's disposition of the case.

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 493 member life insurance companies. ACLI members hold 77.3% of the life insurance written nationwide. Based on a review of

the corporate structures of its member companies and the life and nonlife insurance operations of these companies and their affiliates, the ACLI believes that the precise tax issue raised in the present case could potentially arise in a significant number of cases involving ACLI members.

The Prudential Insurance Company of America is a member of ACLI and one of the nation's largest life insurance companies. Prudential is also the common parent corporation of an affliated group of nonlife companies. Prior to their acquisition by Prudential, those nonlife affiliates that suffered losses were allowed to offset those nonlife losses against the nonlife income of other profitable affiliates. As a result of the acquisition of these nonlife affiliates by Prudential, however, the Commissioner has taken the position, in reliance on the same regulations[2] that the Third Circuit found ambiguous in the instant case (Pet. App. 15a-17a), that such offsetting is no longer permissible. In short, the substantive tax issue raised in Prudential's case is identical to that presented by the petitioners here.

Prudential, moreover, is a New Jersey corporation with its principal place of business in Newark. Thus, if Prudential were to proceed in the Tax Court (*see* 26 U.S.C. § 6213(a)) or in the United States District Court for the District of New Jersey (*see* 28 U.S.C. § 1346(a)(1) (1994)), venue for its appeal would be proper in the Third Circuit (*see* 26 U.S.C. § 7482(b)(1)(B), 28 U.S.C. § 1294(1) (1994)), and the decision below presumably would be controlling in Prudential's case if this Court were to deny the petition in this case. Prudential would also have the option, as all taxpayers do, to bring a refund suit in the United States Court of Federal Claims (*see* 28 U.S.C. § 1346(a)(1) (1994)), from which an

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[2] *See* Treas. Reg. § 1.1502-47(m)(3)(vi), (4) (*codified at* 26 C.F.R. § 1.1502-47(m)(3)(vi), (4)).

appeal would lie to the Federal Circuit (*see* 28 U.S.C. § 1205(a)(3) (1994)). Nevertheless, its Tax Court and district court options will, as a practical matter, be foreclosed if the decision below is permitted to stand.

Merck & Co., Inc. is one of the country's leading manufacturers and distributors of prescription and over-the-counter drugs. Sunoco, Inc. is one of the largest independent petroleum refiner-marketers in the United States. Like Prudential, Merck and Sunoco are subject to the appellate jurisdiction of the Third Circuit in tax cases and thus are adversely affected by the decision below.

The Tax Foundation is a nonprofit, non-partisan public policy research and educational organization whose mission is to provide the public and policymakers with reliable, credible information and analysis in the belief that this will result in better public policies. As a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (the "Code") (26 U.S.C. § 501 (c)(3)), the Tax Foundation relies entirely on voluntary contributions from philanthropic foundations, businesses, and individuals across the country. The Tax Foundation believes that the issue raised here is of great public importance and should be resolved promptly by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DOCTRINAL CONFLICT IN THE CIRCUITS WARRANTS IMMEDIATE REVIEW BY THIS COURT

The petition clearly demonstrates (pp. 9-11) the doctrinal conflict between the decision of the Third Circuit below and decisions of the Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and Federal Circuits, in which those courts declined to give deference to an agency litigating

position interpreting an ambiguous regulation.[3] While none of the cases arising outside the Third Circuit involved the life/nonlife consolidated return regulations, and some of those cases involved nontax issues, this case nonetheless is ripe for immediate review by this Court for several reasons.

First, as evidenced by the number of circuit court cases that have involved the generic issue of deference to an agency interpretation of an ambiguous regulation—asserted only in litigation—the issue is a recurring and pervasive one of administrative law. It is not limited to the interpretation of the consolidated return regulations in dispute here. Nor is it limited to the interpretation of Treasury regulations. Rather, it applies to the interpretation of regulations promulgated by all federal agencies, with special applicability to tax regulations because of their volume and complexity. Thus, a multi-circuit doctrinal conflict presently exists in the courts of appeals.

Second, in light of the number of circuits that have already addressed the issue, there is far less promise than usual that additional consideration by the courts of appeals will elucidate the issue further or otherwise aid the Court in its ultimate disposition of the matter. The issue

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[3] *See CSI Hydrostatic Testers, Inc. v. Commissioner*, 62 F.3d 136 (5th Cir. 1995) (*per curiam*); *Longhi v. Animal & Plant Health Inspection Serv.*, 165 F.3d 1057 (6th Cir. 1999); *Harco Holdings, Inc. v. United States*, 977 F.2d 1027 (7th Cir. 1992); *Brewster v. Sullivan*, 972 F.2d 898 (8th Cir. 1992); *United States v. Trident Seafoods Corp.*, 60 F.3d 556 (9th Cir. 1995); *William Bros., Inc. v. Pate*, 833 F.2d 261 (11th Cir. 1987); *AMP, Inc. v. United States*, 99-2 U.S.T.C. ¶ 50, 728, 1999 U.S. App. LEXIS 18022 (Fed. Cir. 1999). The District of Columbia Circuit has also recently addressed this issue, holding that deference was due to the litigating position of the archivist of the United States interpreting his own ambiguous regulation. *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999).

is appropriate for review now, and nothing is to be gained by postponing this Court's consideration of the important question presented.

Third, as evidenced by the large number of participating *amici* and the varied interests they represent, the issue raised here is one of great breadth and overarching importance. To the extent that corporate *amici* or members of association *amici* are subject to the appellate jurisdiction of the Third Circuit, the adverse implications of the decision below are obvious. Members of association *amici* that are subject to the jurisdiction of other courts of appeals, *i.e.*, those that have resolved the issue differently from the Third Circuit and those that have not yet addressed the issue, are also disadvantaged by the uncertainty resulting from the multi-circuit split that presently exists. Only this Court can eliminate that uncertainty and ensure a uniform rule for all parties.

What is specifically at stake here is the balance of litigating power between taxpayer and tax collector in a large number of tax cases—those involving the proper interpretation of ambiguous Treasury regulations—and, more generally, between the regulator and the regulated in all areas in which federal regulatory power is exercised and the government's regulation is ambiguous. This is a fundamental issue that is worthy of this Court's consideration.

Finally, it is particularly significant that the Federal Circuit has recently spoken on the issue and indicated that it would not defer to an IRS revenue ruling issued in anticipation of litigation which interpreted an ambiguous tax regulation.[4] From this it would follow, *a fortiori*, that the Federal Circuit would not defer to a litigating

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[4] *See AMP Inc.*, 1999 U.S. App. LEXIS 18022, at *13 n.3.

position of the IRS interpreting an ambiguous tax regulation where the litigating position was not even embodied in a revenue ruling or other announcement or decision of the National Office of the IRS. As discussed above (pp. 4-5), *amicus* Prudential will not litigate in the Tax Court or the district court if this Court declines review here, but rather will bring a refund suit in the Claims Court, the appeal of which will be heard in the Federal Circuit. It thus appears that a conflict will arise between the Third and Federal Circuits on the deference due to an IRS interpertation of the very consolidated return regulations that are here in dispute. Accordingly, the present case is a particularly appropriate vehicle for resolving the doctrinal conflict in the circuits as to the deference due to an agency litigating position interperting an ambiguous regulation.

If the Court grants the petition, it need not delve into the intricacies of the consolidated return regulations in order to decide the case on the merits. Once having resolved the deference issue, the Court would be free to remand to the Third Circuit for consideration of the underlying tax issue on its merits.

II. THE DECISION BELOW TO ACCORD DEFERENCE TO A MERE IRS LITIGATING POSITION INTERPRETING AN AMBIGUOUS TREASURY REGULATION IS INCONSISTENT WITH PROVISIONS OF THE INTERNAL REVENUE CODE THAT ACCORD NO DEFERENCE TO THE MORE DELIBERATIVE LEGAL CONCLUSIONS OF THE TAX COURT AND TO WRITTEN DETERMINATIONS OF THE IRS

In two respects, the decision of the court of appeals is strikingly at odds with the language and structure of the Internal Revenue Code.

A. The Third Circuit Would Accord Greater Deference to an IRS Litigating Position Interpreting an Ambiguous Treasury Regulation Than It is Permitted by Statute to Give to a Legal Conclusion of the Tax Court

In *Dobson v. Commissioner*, 320 U.S. 489, 502 (1943), this Court held that when a court of appeals "cannot separate the elements of a [Tax Court] decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand," and that "[i]n deciding law questions courts [of appeals] may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." Five years after *Dobson* was decided, Congress repudiated *Dobson*'s holding that reviewing courts must give deference to the Tax Court.[5] The statutory rule in effect since 1948 appears in section 7482(a) of the Code, which provides that "[t]he United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions

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[5] *See* An Act to Revise, Codify and Enact into Law Title 28 of the United States Code entitled "Judicial Code and Judiciary," Pub. L. No. 80-773, 62 Stat. 869 (1948) (amending section 1141(a) of the Internal Revenue Code of 1939 and explicitly reversing the *Dobson* rule by statute) ("1948 Act"), *reprinted in* 1 U.S.C.C.A.N. A1. *See also* S. Rep. No. 80-1559, at 13 (1948) (stating that Congress intended that the 1948 Act repeal the rule laid down in *Dobson*); 94 Cong. Rec. 8500, 8500-01 (1948) (statements of Rep. Reed and Committee on the Judiciary) (stating that the 1948 Act provides a "much needed correction" that "removes all traces of the *Dobson* decision"); 93 Cong. Rec. A3281 (1948) (statement of Rep. Hobbs) (stating that the *Dobson* decision was "upsetting" and "undesirable" in that it gave "to a body inferior to the appellate courts an unreviewable power of construing tax laws even greater than the regulation-making power given to the Treasury Department, inasmuch as the validity of a Treasury regulation is subject to review by the appellate courts").

tried without a jury . . . ." 26 U.S.C. § 7482(a). Such review, of course, insofar as it involves conclusions of law, is de novo. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."); *accord Ornelas v. United States*, 517 U.S. 690, 701 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995); *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

It remains unexplained why, on the one hand, a court of appeals should defer to a litigating position of the IRS interpreting an ambiguous regulation and, on the other, the same court of appeals should exercise de novo review of the conclusions of law of the Tax Court, which is, by contrast, a neutral arbiter of the rights of a taxpayer. The Third Circuit failed to address this issue, but its resolution of the case stands logic on its head. There is no justification for its according deference to the mere litigating position of the government with respect to an ambiguous regulation when it was barred by statute from deferring to the legal conclusion of the Tax Court, and it was error for the Third Circuit to defer in this case.

B. The Third Circuit Would Accord Greater Deference to an IRS Litigating Position Interpreting an Ambiguous Treasury Regulation Than It Is Permitted by Statute to Give to a "Written Determination" of the IRS

Section 6110(k)(3) of the Code provides that "[u]nless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent." 26 U.S.C. § 6110(k)(3). Treasury Regulations Section

301.6110-2(a), (d), (e), and (f) define "a written determination" to include a private letter ruling, a determination letter, and a technical advice memorandum. 26 C.F.R. § 301.6110-2(a), (d), (e), (f). The Third Circuit did not explain why, on the one hand, a court of appeals should defer to a litigating position of the IRS interpreting an ambiguous regulation and, on the other hand, the same court of appeals is forbidden to treat "a written determination" issued by the IRS as precedent. Indeed, it is incongruous that a court of appeals should defer to the IRS's litigating position although the taxpayer would have been prohibited by statute from even citing, and the court from using, a contrary IRS letter ruling as precedent. The Third Circuit's decision is even more incomprehensible in view of the fact that this statutory proscription against reliance on a written determination applies even if the determination involves the interpretation of an ambiguous regulation.[6] Again, there is no rationale for according greater deference to a litigating position interpreting an ambiguous regulation than to a written determination of the IRS. In fact, there would be every reason to defer more to a written determination than to a mere litigating position interpreting an ambiguous regulation.

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[6] Nothing in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), is inconsistent with the text. In that case, the Court referred to private letter rulings as evidence of the historical position of the IRS, and indicated that the rulings were to be given whatever persuasive force they had. (So too are litigating positions of the IRS.) *Rowan* in no way suggests contrary to the plain language of the statute that private letter rulings are entitled to deference.

III. THE INTERNAL REVENUE CODE DOES NOT PROVIDE FOR OR REQUIRE DEFERENCE TO AN IRS LITIGATING POSITION INTERPRETING AN AMBIGUOUS TREASURY REGULATION, AND IT IS IMPROPER TO ACCORD DEFERENCE TO SUCH A POSITION

In his opinion for a unanimous Court in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996), Justice Scalia, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), explained that courts give deference to regulations, because Congress intended that statutory ambiguity be resolved in the first instance by the agency responsible for administering the statute, "and desired the agency (rather than the courts) to possess whatever degree of discretion the [statutory] ambiguity allows." Justice Blackmun made much the same point in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), a federal income tax case. In explaining why deference should be accorded to Treasury regulations, he referred to section 7805(a) of the Code which provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title . . . ." 26 U.S.C. § 7805(a). In short, under both Justice Scalia's and Justice Blackmun's formulations, courts defer to agency regulations that are reasonable interpretations of the statute because Congress said they should defer to such regulations.

Congress, on the other hand, has nowhere directed that courts defer to agency litigating positions interpreting ambiguous regulations. And Congress has not done so for good reason, *i.e.*, because "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley*, 517 U.S. at 741. Regulations typically are issued only after compliance with the Administrative

Procedure Act, including full notice and comment. 5 U.S.C. § 553 (1994). Thus, interested parties are afforded the opportunity to express their views by written comment and oral testimony, *see id.* § 553(c), and, in the case of tax regulations, consideration occurs within the Treasury and the IRS at very high levels. *See* Treas. Reg. § 601.601 (*codified* at 26 C.F.R. § 601.601). What we have here, by contrast, is simply the position of a lawyer in the IRS or the Tax Division of the Justice Department which is formulated and expressed only in an adversarial proceeding. No provision of the Code even remotely suggests that deference is to be accorded to such a position.[7]

If there is to be judicial deference to the government's litigating positions concerning ambiguous regulations, *all* courts would have to defer, not just the circuit courts. As a result, once a district court or the U.S. Claims Court or the Tax Court deferred, there would be little left for a circuit court to do. Although Congress repealed the *Dobson* doctrine by its enactment of section 7482 of the Code, the doctrine espoused below—that courts must defer to the government's litigating positions with respect to ambiguous regulations—has the effect of partially nullifying that fifty-one year old provision of law.

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[7] This Court long ago recognized that regulations are in a category of respect that far exceeds the respect due to other administrative pronouncements. In deciding for the taxpayer in *Commissioner v. Tellier*, 383 U.S. 690 (1966), the Court explained that the Commissioner's "view finds considerable support in other administrative and judicial decisions It finds no support, however, in any *regulation* or statute or in any decision of this Court . . . ." *Id.* at 691 (emphasis supplied) (footnote omitted).

IV. THE RULE ADOPTED BY THE THIRD CIRCUIT IS A SERIOUS THREAT TO PROPER TAX ADMINISTRATION

In the tax area, the Third Circuit's decision raises particularly serious problems involving the proper administration of the Code. These problems arise for two reasons. The first is the sheer volume and complexity of the regulations promulgated by the Treasury Department. The second arises from the fact that the IRS frequently finds itself in a position where its line attorneys, or those from the Justice Department, must assert inconsistent positions in order to protect the government from being whipsawed.

Because of the volume of tax regulations and because many of these regulations contain ambiguities, the implications of the Third Circuit's decision in the tax area are breathtaking. In every case of ambiguity, the court would not be seeking the better of the two interpretations advanced by the parties, but would only have to determine whether the interpretation advanced by the IRS was reasonable and could sustain that interpretation even if the taxpayer's interpretation was more consonant with the language and scheme of the statute. This tipping of the scales in favor of the IRS would have a profound effect on the outcome of tax cases, and should not be permitted to occur without some indication from Congress that this is its intention. Insofar as we are aware, Congress has never given any such indication and, as discussed above in Parts II and III of this brief, all congressional signs are to the contrary. This Court has not addressed the question in detail. We are aware of only a single brief passage in which the Court mentioned the issue in a tax case. In *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 562-63 (1991), the Court suggested that deference was not due to an IRS litigating position interpreting an ambigu-

our regulation where "the Commissioner has not issued an authoritative, prelitigation interpretation."

The IRS has a need to protect itself from whipsaw, and that need exacerbates the administrative problems. For example, a husband may be paying deductible alimony and nondeductible child support to his former wife, and a dispute may arise as to how the total payment should be allocated between the two categories. *See Commissioner v. Lester*, 366 U.S. 299 (1961). The IRS will not want to be in a position of having a large portion of the payment treated as deductible alimony in the husband's case, but as excludable child support in the former wife's case. To protect against this eventuality, the IRS may take an inconsistent position in the two cases, each in a different circuit, asserting in the husband's case that most of the payment is nondeductible child support, and in the former wife's case that most of the payment is taxable alimony. If the criteria for allocating between alimony and child support are prescribed in an ambiguous regulation,[8] under the Third Circuit's rule, the inconsistent IRS positions would both be accorded deference, and both the husband and his former wife would lose.

A similar situation can arise in the case of run-of-the-mill property valuations. To protect against whipsaw, the IRS may place a high value on property for estate tax purposes and a low value on the same property for purposes of calculating an income tax charitable deduction. *See United States v. Cartwright*, 411 U.S. 546 (1973). If the valuation procedure is prescribed in an ambiguous regulation,[9] presumably both IRS valuations would be ac-

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[8] *See* Temp. Treas. Reg. § 1.71-1T A-14, A-17.

[9] *See* Treas. Regs. §§ 1.170A-1(C), 20.2031 & 20.2032 (*codified at* 26 C.F.R. §§ 1.170A-1(C), 20.2031 & 20.2032).

corded deference under the standard applied by the court below.

The same type of problem can arise in the case of more complicated corporate transactions. The question may be whether a distribution in redemption of stock is essentially equivalent to a dividend or is to be considered in part or full payment in exchange for the stock. *See United States v. Davis*, 397 U.S. 301 (1970). Again, the IRS may be subject to whipsaw between an individual shareholder who wants the redemption treated as an exchange, which will produce favorable capital gains treatment, and a corporate shareholder which desires dividend characterization in order to take advantage of the deduction for intercorporate dividends. Under the decision of the Third Circuit, if the controlling regulation for differentiating between an exchange and a dividend is ambiguous,[10] the inconsistent (albeit not unreasonable) positions taken by the IRS in each case would be accorded deference in the taxpayers' respective circuits.

Numerous other examples of whipsaw could be given, but these few should suffice to illustrate the problem. If the Third Circuit's decision were followed in whipsaw cases, the IRS might prevail on both sides of these cases. Such inconsistent results would be harsh and unfair, and should not be allowed to occur.

* * * *

The essence of the case is this. The court of appeals did not reach its own decision on the legal issue before it. Confronted by an ambiguous regulation and no prelitigation interpretation of that regulation, the court abdicated its responsibility by rendering judgment on the basis of deference to the IRS's litigating position. Parties facing

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[10] *See* Treas. Reg. 1.302-1 (*codified at* 26 C.F.R. § 1.302.1).

the government in litigation are entitled to have the courts reach their decisions based on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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